DA 09-0500
IN THE SUPREME COURT OF THE STATE OF MONTANA

****

LON PETERSON,

Plaintiff/Appellant and Cross-Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Defendant/Appellee and Cross-Appellant.

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AMICUS BRIEF

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STATEMENT OF ISSUES

1. Where questions of fact exist as to the insured's liability, does an insurer's initial assessment that negligence is 50% for the insured and 50% for the claimant establish that the insured's liability is reasonably clear?

2. Where questions of fact exist as to the insured's liability, is an insurer required to pay policy proceeds without getting a release of claims against the insured because an adjuster initially assesses negligence at 50% for the insured and 50% for the claimant?

STATEMENT OF INTEREST

Amicus curiae the American Insurance Association ("AIA") is a leading national trade association representing some 350 major property and casualty insurance companies that collectively underwrote more than $117 billion in direct property and casualty premiums in 2008, including almost 30 percent of the total auto (and total property and casualty) insurance market in this State. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts.

The decision in this case could have significant impacts on AIA's member insurers and their policyholders. Mr. Peterson's position that an adjuster's initial assessment that negligence is 50% for the insured and 50% for the claimant requires the immediate payment of policy proceeds would improperly expand the duty to advance pay to include cases where genuine issues of fact exist as to the insured's liability.

STATEMENT OF FACTS

The facts relevant to the issues raised by *Amicus* are that Mr. Peterson was involved in a motor vehicle accident with Mr. Lindberg on June 15, 2004. (Pl's Exh 29; Vol 2, 257-58). St. Paul Fire & Marine Insurance Company (St. Paul) insured Mr. Lindberg. The claim was initially investigated by St. Paul through its adjuster, Mr. Allums. (TR Vol, 2 420). Sixteen days later, Mr. Allums made an initial assessment that Mr. Peterson was 50% at fault and Mr. Peterson was 50% at fault. (TR Vol 2, 302-04). Mr. Allums then continued his investigation, including retaining an expert to help determine on which side of the centerline of a gravel road the accident occurred. (TR Vol 2, 329-330). That expert opined that Mr. Peterson may have actually crossed over the centerline and hit Mr. Lindberg. (TR Vol 2, 337-38). This was consistent with Mr. Lindberg's position that he was on his own side of the road. In addition, Mr. Lindberg was adamant he was not speeding, not distracted by a cell phone and not negligent.

SUMMARY OF THE ARGUMENT

An insurer has a continuing duty to both its insured and third party claimants to investigate and evaluate claims. Where questions of fact exist as to the insured's liability, liability is not reasonably clear, and the insured is entitled to a defense under the policy purchased from the insurer. An initial assessment of liability by an adjuster is exactly that – the adjuster's initial impressions based on the information available at that time.

To accept Mr. Peterson's argument would make adjusters the final arbiter of genuine issues of fact regarding the insured's liability by requiring immediate payment based on an adjuster's initial liability assessment that negligence is 50% for the insured and 50% for the claimant. For a person only able to afford moderate insurance, such a rule could have devastating consequences. For example, consider an insured with $100,000 policy limits per person, a third party claimant with $200,000 in medical expenses and lost wages, and a 50%-50% assessment of fault by an adjuster. Under Plaintiff's approach, the $100,000 limits would have to be paid immediately without a release of the insured. The insured's personal assets would be exposed in a case where a jury's determination that was just one percent different than the adjuster's opinion could mean the insured owed nothing.

Furthermore, many policies provide that once limits are exhausted, the insured's defense can be terminated. This type of provision was discussed in *Watters v. Guaranty National Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626. There, the insurer had argued that such a provision in conjunction with paying policy limits without getting a release of the insured would leave the insured hanging and get the insurer sued by its insured for bad faith. This court found little risk of such a suit:

> Guaranty's alleged liability for bad faith is based on a reasonable forecast of future events: after payment of the $50,000 policy limits, [the insured] would be "hung out to dry" for whatever judgment in excess of this amount the Watters could obtain, and quite possibly without the assistance of counsel provided under his policy with Guaranty. However, precisely on what grounds the predicament would have confounded Moore's reasonable expectations under his policy with Guaranty, and consequently given rise to a viable bad faith claim under the [Unfair Trade Practices Act] UTPA is less than clear.

2000 MT 150, ¶ 44.

Thus, the Court clearly suggested that paying limits and ending the defense was not going to result in a viable UTPA claim because such actions are proper.

People purchase insurance in excess of mandatory limits to protect themselves. When issues of fact exist regarding liability, that protection comes in the form of a defense paid for by an insurer and insurance assets that can be used to settle a claim. An adjuster's initial opinions on liability cannot resolve those issues

of fact nor deny the insured the protections purchased through their insurance premiums.

ARGUMENT

1. Requiring advance payment of policy proceeds based on a preliminary assessment of liability would be contrary to an insurer's continuing duty to investigate, evaluate and settle claims against its insured.

A. An insured owes its insured a continuing duty to investigate claims.

The Unfair Trade Practices Act (UTPA) requires an insurer to investigate, evaluate, and when liability is reasonably clear, settle claims. Mont. Code Ann. § 33-18-201(4) requires an insurer to perform a reasonable investigation of claims based on all available information. An insurer owes both an insured and a third party claimant a duty to attempt in good faith to pay claims, but only when liability is reasonably clear. Mont. Code Ann. § 33-18-201(6). Either an insured or a third party can sue for a violation of these subsections. Mont. Code Ann. § 33-18-242(1). The duty to investigate and the duty of good faith are continuing duties. *Palmer v. Farmers Insurance*, 261 Mont 91, 121, 861 P.2d 895 (1993). Therefore, the insurer must continue to investigate and assess claims even through trial. Having an adjuster's preliminary assessments be binding on the insurer and insured is contrary to that ongoing duty and is contrary to the realities of litigation.

Facts may arise as an investigation progresses that can dramatically change initial liability assessments. Under Mr. Peterson's theory, those facts would be

irrelevant as the insurer would have been required to pay, even up to policy limits, before the investigation was completed. Instead of a duty to investigate based on "all available information," the duty to investigate would, in this case, end after two weeks. Such a result would be unparalleled, and is clearly not consistent with the intent of the UTPA.

B. An insurer has a duty to protect the interests of its insured, including protecting the insured from personal liability.

The law of good faith began with the recognition of an insurer's duty to protect its insured from uninsured liability. *Gibson v. Western Fire Ins. Co*., 210 Mont. 267, 275, 682 P.2d 725 (1984). In *Gibson*, this Court held that although the insurance policy gives the insurer the right to settle claims, that right includes a fiduciary duty on the part of the insurer to give the insured's interests as much consideration as it gives its own. The insured was awarded both compensatory and punitive damages when the insurer failed to settle and exposed the insured to personal liability in the form of a verdict in excess of policy limits.

Personal exposure may also be created if the insurer pays policy limits without getting a release of claims against its insured. An insurer who pays policy limits without getting a release prior to completing a reasonable investigation of all available information may be sued by the insured. Under Mr. Peterson's strained construction, an insured could easily argue that by paying limits without getting a release of claims just two weeks into the investigation of a complicated claim and

adamantly disputed by the insured, the insurer committed bad faith. The insured's case would seem even stronger where that investigation would have revealed expert opinions that the insured was not at fault, as happened here. Thus, Mr. Peterson's construction could set up potential catch-22's in cases with early observations about potential liability – insurers being sued by claimants for not settling or by insureds when they do settle.

C. Mr. Peterson's theory could give the insurer improper control over the defense of the claims against the insured.

This Court has held that where conflicts of interest may exist between the insurer and insured, the insurer cannot control the defense of a claim against the insured. *In re: Rules of Professional Conduct*, 2000 MT 110, 299 Mont. 321, 2 P.3d 806. The Court first recognized that the insured has legitimate interests in the litigation:

> [B]oth insurance companies and insureds have important and meaningful stakes in the outcome [of] a lawsuit against the insureds, stakes that include not only the money that the insurance company must pay in defense and settlement, but also the uninsured liabilities of the insured, which include not just any judgment in excess of policy limits, but also the insured's reputation and other non-economic stakes.

Id. at ¶ 37.

The Court then held that where these interests potentially conflict, the insurer cannot control the insured's defense. Instead, the insurer must provide the insured an attorney who represents only the interests of the insured. *Id*. at ¶ 38. A

demand by a claimant to pay policy limits when there are questions of fact regarding the insured's liability clearly creates a conflict of interest. Under *In re: Rules of Professional Conduct*, that conflict means the insured is allowed to control the defense through counsel retained by the insurer, including decisions to pay policy limits. Although the initial liability assessment here was made before counsel was retained for Mr. Lindberg, an insurer's duties under *In re: Rules of Professional Conduct* cannot be avoided by simply paying limits before suit is filed.

D. Mr. Peterson's theory is contrary to the goals of the UTPA.

Binding an insurer to the adjuster's initial assessment is contrary to the UTPA and to the search for the truth embodied in our justice system. Insurers have a duty to properly investigate claims, assess liability and then either defend the insured or pay the injured person. This is by necessity an ongoing process. It is not unusual for insurers to make preliminary assessments regarding coverage, liability and damages. This helps insurers and insureds evaluate risk and determine whether or not additional investigation is needed. In addition, insurers are required by law to post and keep accurate reserves on their files, and can be penalized if they fail to do so. Thus, assessments of exposure are required during the life of the case.

An environment in which early impressions result in automatic liability will chill early claims resolution by discouraging claims professionals from examining claims critically from the outset. Under Mr. Peterson's approach, an insurer would have to stop the investigation and pay limits as soon as any facts are discovered that support the claimant's position. Such a result would ignore an insurer's duty to its insured. There is nothing to be gained by discouraging the frankest, earliest assessments and movement in such a direction. By way of analogy, if district attorneys were bound by their initial assessment of who was guilty, to avoid guilty persons from escaping justice, prosecutors would either have to indict every person of interest, or else no one. Neither would further the interests of justice.

2. The Existence of Questions of Fact regarding the Insured's Liability Requires a Defense of the Insured, not Advance Payments to Claimants.

This Court has already determined that if genuine questions of facts exist regarding the insured's liability, then liability is not reasonably clear under the UTPA. *Giambra v. Traveler's Indemnity Co*., 2003 MT 289, 318 Mont. 73, 78 P.3d 880. Therefore, where questions of fact exist, the insurer does not have a duty to advance pay. Similarly, the Court has held that an insurer cannot resolve issues of fact regarding the claims against the insured. Instead, those questions of fact entitle the insured to a defense by the insurer. *Farmers Union Mutual Ins. Co. v. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381. An adjuster's initial assessment of liability cannot pre-empt these rules of law.

A. Liability is not reasonably clear if material issues of fact exist as to the insured's liability.

Liability is not reasonably clear under the UTPA when questions of fact exist as to the insured's liability. *Giambra v. Traveler's Indemnity Co*., 2003 MT 289, 318 Mont. 73, 78 P.3d 880. In *Giambra*, Zadkiel Giambra was injured in a sled/automobile accident. His parents brought a direct action against Travelers for medical expenses incurred as a result of the accident. They claimed that liability was reasonably clear and therefore Travelers was obligated to advance pay medical expenses under *Ridley v. Guaranty National Ins. Co*., 286 Mont. 325, 951 P.2d 987 (1997). The Court found that questions of fact existed as to negligence and liability, and therefore liability was not reasonably clear and there was no duty to advance pay:

> In *Ridley*, we held that pursuant to §§ 33-18-201(6) and (13), MCA, when liability is reasonably clear, an insurer is obligated to advance payment of an injured third party's medical expenses until a final settlement is reached. *Ridley*, 286 Mont. at 334, 951 P.2d at 992.
>
> ¶ 16 Here, genuine issues of material fact exist regarding negligence and liability. As such, [the insured's] liability is not reasonably clear, and Travelers has no duty under Ridley to advance payment of Zadkiel's medical expenses.

2003 MT 289, ¶¶ 15-16.

Mr. Peterson attempts to ignore *Giambra* by arguing that an adjuster can resolve obvious issues of fact through an initial assessment of liability. However,

this Court has already made it clear that adjusters cannot resolve issues of fact regarding the insured's liability.

B. Montana Law does not allow Insurers to unilaterally resolve genuine issues of fact involving the Liability of an insured.

An insurer cannot unilaterally resolve questions of fact as to the insured's liability in the context of the duty to defend. *Farmers Union Mutual Ins. Co. v. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381. In *Staples*, a question of fact existed that was crucial to the insurer's duty to defend. The specific issue was who owned a horse named Frenchy. Farmers Union investigated the claim, talked to the witnesses, and concluded that the ownership of Frenchy was such that there was no coverage. It then declined to defend its insured. On appeal, this Court held that an insurance adjuster cannot unilaterally decide questions of fact that are critical to the duty to defend. This Court found that the fundamental protective purpose of an insurance policy and the obligation of an insurer to provide a defense required that all factual assertions be resolved in favor of the insured. 2004 MT 108, ¶¶ 22 to 26. Therefore, ownership of Frenchy could only be resolved by a jury in the lawsuit against the insured in which Farmers Union paid the costs of defense. By deciding the issue itself, Farmers Union was found to have breached the duty to defend, waived all policy defenses and rendered itself liable as a matter of law to a settlement in excess of policy limits. *Id*. at ¶ 34.

Staples makes it clear that an adjuster cannot resolve factual issues when determining an insurer's duty to defend because to do so would reduce the protections of the insurance purchased by the insured. Mr. Peterson is asking this Court to reach the exact opposite conclusion with respect to the duty to settle. Mr. Peterson would allow an adjuster's initial liability assessment to in effect resolve all issues of fact regarding the insured's liability, even though the insured is denying liability. This rule would clearly impact the insured. Under the hypothetical facts discussed above, an adjuster's initial assessment of liability would require immediate payment of policy limits without obtaining a release of the insured, leaving the insured's personal assets exposed. The insurer might also be able to terminate the defense upon the payment of limits. *Watters v. Guaranty National Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626. To allow such a result would be contrary to *Staples*, the protective purposes of an insurance policy, and the insurer's duty to defend.

3. Requiring payment of policy limits where questions of fact exist would create a conflict of interest with the insured.

In *Watters v. Guaranty National Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626, this Court acknowledged the insurer's concern that it can potentially face a Hobson's Choice of either paying a claimant without getting a release of all claims and get sued by the insured for not protecting his interests, or refusing to pay without a release and get sued by the third party claimant for not settling. The

UTPA reduces the potential for conflicts between the duties to insureds and third parties by only creating those duties where liability is "reasonably clear." It then sets a high standard for "reasonably clear liability" by creating the following defense:

> An insurer may not be held liable under this section if the insurer had a reasonable basis in law or fact for contesting the claim or the amount of the claim, whichever is an issue.

Mont. Code Ann. § 33-18-242(5).

A similar standard was set forth in *Giambra v. Traveler's Indemnity Co*., 2003 MT 289, 318 Mont. 73, 78 P.3d 880, where this Court recently equated "reasonably clear liability" with the "no genuine issue of fact" standard applicable for motions for summary judgment.

These high standards provides the proper balance between an insured's contractual right to be protected from personal liability and improperly delaying payment of money admittedly owed to an injured person. Where the undisputed facts show liability in excess of policy limits is reasonably clear, an insured cannot have a reasonable expectation that payments will be withheld from an innocent third party. *Watters v. Guaranty National Ins. Co.*, 2000 MT 150, ¶ 57. However, where material issues of fact exist, the insurer's fiduciary duty to protect its insured must prevail over the duty to pay third parties. This is particularly true where coverage has been purchased in excess of the statutory minimum limits.

Where there is a legitimate basis for contesting a claim, the insured must be given the full protection of the coverage purchased, including a zealous defense of reasonably contested claims with policy limits intact. The claim against Mr. Lindberg was clearly such a circumstance. Questions of fact existed as to the location of the impact with Mr. Peterson, the speed of the vehicles, what speed would be reasonable and prudent, and whether Mr. Lindberg's cell phone ringing had anything to do with the accident. Mr. Lindberg was entitled to his day in court where those issues would be litigated at St. Paul's expense with the full protection of his policy in place, regardless of Mr. Allums' best guesses of how that day in court would come out.

CONCLUSION

AIA requests that this Court refuse to expand the duty to advance pay to circumstances where material issues of fact exist as to the insured's liability. AIA further requests that this Court hold that an insurer's initial assessment of liability at 50%-50% is not and cannot be a resolution of those material issues of fact, nor is it what constitutes "reasonably clear" liability under Montana law.

Dated this ___ of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by U.S. Mail, this ____ day of January 2010:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and has a word count of 3,379 calculated by Microsoft Word 2000, excluding table of contents, table of citations, certificate of service and certificate of compliance

DATED this ___ day of January 2010.

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